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No. 661 29

In the Supreme Court of the United States

OCTOBER TERM, 1959

GIACOMO REINA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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OPINION BELOW

The opinion of the court of appeals (Pet. 19–21) is reported at 273 F. 2d 234.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1959 (Pet. 19). The petition for a writ of certiorari was filed on January 27, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner, who had been granted immunity under 18 U.S.C. 1406, could properly be punished for contempt for his refusal to answer questions within the scope of that section.

2. Whether the immunity was required to include pardon of a past, finally adjudicated narcotics conviction of petitioner for an offense on which he was then serving his sentence.

3. Whether the sentence here was excessive.

STATUTE INVOLVED

18 U.S.C. 1406:

> Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—
>
> (1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,
>
> (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U.S.C., sec. 174), or
>
> (3) the Act of July 11, 1941, as amended (21 U.S.C., sec. 184a),
>
> is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness

shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section.

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals for the Second Circuit (Pet. 19–21) affirming the judgment of the District Court for the Southern District of New York which had convicted him of contempt for his refusal to answer questions before a grand jury (R. 50–51). A sentence of two years' imprisonment was imposed, subject to 60 days' opportunity for petitioner to purge himself of the contempt (R. 50).

On December 17, 1958, petitioner was ordered by the district court to answer certain questions before the grand jury, pursuant to the provisions of 18 U.S.C. 1406, *supra*, pp. 2–3 (R. 1, 16–17). He refused to do so (R. 25) on the ground that the immunity provided under the statute was insufficient under the Fifth and Fourteenth Amendments of the Constitution (R. 30). He did not claim that the questions asked were outside the scope of the statute.

ARGUMENT

1. (*a*) With respect to the question petitioner tenders as to whether the immunity granted by 18 U.S.C. 1406 extends to prosecution in the state courts, it is to be noted that this statute, in both its procedural and substantive aspects, is the same as the earlier 18 U.S.C. 3486(c), the immunity statute before the Court in *Ullmann* v. *United States,* 350 U.S. 422. The only difference is that the latter is concerned with compelling testimony in the area of national security, while Section 1406 is concerned with violations of the narcotics laws enacted pursuant to the congressional powers with respect to commerce and taxation. In its procedural aspects, Section 3486(c) was, in turn, unique among federal immunity statutes, though in its substantive phase it "is worded virtually in the terms of the 1893 Act" (*id.,* at 434) upheld in *Brown* v. *Walker,* 161 U.S. 591, the first federal statute to grant complete immunity from prosecution. Section 1406, here involved, was enacted on July 18, 1956, approximately four months after the *Ullmann* decision. In that case, the Court decided, on the basis of *Brown* v. *Walker* and clear legislative history showing that Congress intended to extend the grant of immunity to state prosecutions if it was within its power to do so, that Section 3486(c) does give such protection and, further, that it was within the power of Congress to provide for the national defense thus to forbid a State from prosecuting the witness, just as it was within congressional power, "in the name of the Commerce Clause" (350 U.S. at 436), to proscribe state prosecution of a witness granted immunity under the 1893 Act. *Brown* v. *Walker, supra.* Although there is no

similar legislative history underlying Section 1406, it would seem that in this context *Ullmann* v. *United States* is dispositive on this question.

(*b*) Petitioner points out that in *Tedesco* v. *United States,* 255 F. 2d 35, the Sixth Circuit, notwithstanding the agreement of the parties that Section 1406 "purports to grant to a witness testifying under compulsion both federal and state immunity" (p. 38) and its own interpretation that the statute "clearly undertakes to grant state as well as federal immunity" (p. 39; see also p. 40), expressed "grave doubt", in view of the historic exercise of "concurrent jurisdiction in narcotic matters," "that power resides with the Congress to grant immunity from prosecution in state courts pursuant to state narcotic laws" (p. 39). The court therefore declined to adopt the government's alternative position that the immunity granted by Section 1406 was intended to and does extend to state prosecutions. Instead, it invoked the doctrine that, wherever it is possible to do so, constitutional doubts should be avoided in construing a statute, and held that Section 1406 is separable and is valid as a grant of immunity only against federal prosecution. The court's authority for this holding was the general principle stated in *United States* v. *Murdock,* 284 U.S. 141, 149 (which the government had also invoked), that "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished by the rule against compulsory self-incrimination."[1]

[1] It should be noted, however, that the *Murdock* case did not involve an immunity statute, but only a refusal by a witness in a federal proceeding to testify on the ground that he feared in-

In the instant case, too, the courts below rested upon the *Murdock* principle, rather than *Ullmann*, in rejecting petitioner's contention that Section 1406 does not protect him against state prosecution and is therefore constitutionally deficient. The court of appeals declined petitioner's plea that *Murdock* be re-examined, saying that "such re-examination is not for this court to make" (Pet. 20). Petitioner's renewal of that plea here is based upon his contention that Congress "exceeded its power in purporting to grant immunity 'in any court'" (Pet. 11). As to this, we believe that Congress has such power (see *supra*, pp. 4–5). In any event, we think it is clear that the case does not call for a re-examination of the actual holding of *Murdock*, for, as we have pointed out (fn. 1, pp. 5–6, *supra*), that case did not involve an immunity statute and, hence, raised no question as to the extent of the power of Congress to grant immunity against state prosecutions in legislating pursuant to its delegated powers and the complementary power to pass "necessary and proper" laws.

If there are doubts as to whether Congress intended to and could constitutionally extend the immunity of Section 1406 to state prosecutions, petitioner stands in

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crimination, not under federal law, but only under state law. As to this, the holding was that "Investigations for federal purposes may not be prevented by matters depending upon state law. Constitution, Art. VI, § 2 [*i.e.*, the Supremacy Clause, which was the basis of the decision in *Brown* v. *Walker* that Congress could constitutionally grant immunity against state prosecution. 161 U.S. at 606–607. See also *Ullmann* v. *United States*, 350 U.S. at 434, 436]. The English rule of evidence against compulsory self-incrimination, on which historically that contained in the Fifth Amendment rests, does not protect witnesses against disclosing offenses in violation of the laws of another country" (284 U.S. at 149).

no better position, for the *Murdock* principle[2] supports the holdings below and in *Tedesco* v. *United States*, *supra*, that he is entitled to no more than immunity from federal prosecution in exchange for his privilege under the Fifth Amendment.

Finally, the issues petitioner seeks to raise regarding the possibility of a state prosecution are premature. Such questions could arise directly only if state authorities were to undertake to prosecute a person "for or on account of any transaction, matter, or thing concerning which" he has testified under the compulsion of Section 1406 and only if the state courts were to reject his plea of immunity.[3] We submit that it will be time enough to raise these questions in the event such now-speculative circumstances should arise in the future. At this juncture, particularly in view of the recent *Ullmann* decision, these possibilities seem too remote to warrant consideration by this Court. As the Court said in *Brown* v. *Walker*, 161 U.S. at 608–609, in connection with the contention (rejected by the Court) that the 1893 Act did not give immunity against state prosecution:

> The same answer [that the danger of prosecution by another sovereignty is " 'a danger of

[2] See also *Mills* v. *Louisiana*, 360 U.S. 230; *Knapp* v. *Schweitzer*, 357 U.S. 371; *Feldman* v. *United States*, 322 U.S. 487. These latter cases involved state, not federal, immunity statutes.

[3] There can be no doubt that the actual testimony given under such circumstances could not be used in a state (or federal) prosecution in view of the interdiction of the last clause of the immunity provision of Section 1406. *Adams* v. *Maryland*, 347 U.S. 179.

an imaginary and unsubstantial character' "] may be made to the suggestion that the witness is imperfectly protected by reason of the fact that he may still be prosecuted and put to the annoyance and expense of pleading his immunity by way of confession and avoidance. This is a detriment which the law does not recognize. There is a possibility that any citizen, however innocent, may be subjected to a civil or criminal prosecution, and put to the expense of defending himself, but unless such prosecution be malicious, he is remediless, except so far as a recovery of costs may partially indemnify him. He may even be convicted of a crime and suffer imprisonment or other punishment before his innocence is discovered, but that gives him no claim to indemnity against the State, or even against the prosecutor if the action of the latter was taken in good faith and in a reasonable belief that he was justified in so doing.

2. Petitioner contends that he was not guilty of contempt because the immunity failed to pardon "all past offenses," specifically, his conviction of a violation of the narcotics law several years before, pursuant to which he was then serving a five-year sentence (Pet. 13; R. 42). Petitioner cites no authority asserting such a proposition and adduces in support only a few general, preliminary utterances on "amnesty" from *Brown* v. *Walker,* 161 U.S. 591, 601, 602, which he has misconceived. The privilege against self-incrimination and the immunity that

supplants it relate, by definition, to what may lead to future incrimination of the witness, and not to a past conviction that has been completed and finally adjudicated. "The design of the constitutional privilege is * * * to protect him against being compelled to furnish evidence to convict him of a criminal charge." *Brown* v. *Walker*, 161 U.S. 591, 605; *People ex rel. Hunt* v. *Lane*, 116 N.Y.S. 990, 993–994, affirmed, 196 N.Y. 520; *People* v. *Fine*, 19 N.Y.S. 2d 275, 278–282.[4]

3. Petitioner complains of the two-year sentence as excessive, largely by reason of the sentence of five years imposed several years before. But the present sentence is obviously unrelated to the earlier sentence and has to do only with the present contemptuous refusal to give required testimony. Under the circumstances, particularly in view of the 60-day opportunity to purge himself of the contempt, the sentence was well within the discretion of the trial judge. *Brown* v. *United States*, 359 U.S. 41, 52.[5]

[4] Petitioner labors under similar misconceptions in his attempted reliance (Pet. 14) on the matter of a pardon for past offenses in *Burdick* v. *United States*, 236 U.S. 79, and on a limited and invalid attempt of a court itself to grant immunity, without statutory authority, in *Isaacs* v. *United States*, 256 F. 2d 654, 661 (C.A. 8).

[5] In our view, the 60-day purge provision in the district court's judgment is properly read as applicable for 60 days after final judicial disposition of the judgment, including action by this Court on the petition for certiorari.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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